Alberta Women's Bureau
INFORMATION

ENDING A MARRIAGE:

THE LEGAL ASPECTS OF SEPARATION, ANNULMENT AND DIVORCE

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Alberta
WOMEN'S BUREAU

A Message From The Director

A high regard for the stability of marriage and the family remain central to our way of life, despite a more casual attitude to both marriage and divorce, continuing careers for wives and planned parenthood.

However, marriage and the family appear to be in trouble in our society today. More than ever before in our history the institution of the family is experiencing problems with alcoholism, infidelity, child abuse and wife battering.

This is especially sad when one looks back at the wedding photographs and sees a young couple so in love with one another they promised to share the rest of their lives together. They now find that a relationship so full of promise is ending in disaster!

Because centuries of tradition have supported the continuation of marriage and family ties, couples don't know how to handle an unworkable marriage. Even though attempts are made at reconciliation, some people will continue in an impossible situation because they feel it is "best for the children", or for family or other reasons. Many social workers and marriage counsellors will argue that this approach is wrong and could even prove harmful to all concerned.

Others will find themselves having to make the painful decision of whether to break away from an unhappy marriage even though they could find themselves with full responsibility for the family or even the possibility of being separated from them.

Professional marriage counsellors can help you to reconcile your individual problems. Only you can make the final decisions regarding your marriage.

In the event that all efforts at reconciliation fail, we have prepared the following which sets out in precise and simple terms the basic information you need to end a marriage in Alberta. Read it carefully; it could help prevent additional strain to the heavy emotional stress which, undoubtedly, you have already experienced.

If you have children you should consult two other Alberta Women's Bureau publications which are available free of charge on request:

1) A Child's Lawyer: Legal Counsel, Children and Divorce

2) Children: Custody and Access

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In addition to the procedural aspects of ending a marriage, we can also suggest a source of comfort to everyone who faces such a traumatic event. It's simply this. Almost everyone looks on the end of a marriage as entirely negative, as though it is always a tragedy, carrying with it a deep and lasting stigma.

It doesn't have to be that way. You can try to look on the end of a marriage as the beginning of a new (and possibly better) life. Remember: blessings sometimes arrive cleverly disguised as disasters. Be on the lookout for a chance to turn what most people regard as a disaster into an opportunity for a new beginning, for a fresh start.

But how can you do that?

To begin with, try not to be bitter and resentful. Start by deciding that you won't waste your energies on hatred; make a sincere effort to keep your relationship with your former spouse as compatible as possible. Although it may sound somewhat unrealistic now, trying to follow this advice will put you into that all-important positive frame of mind. Then you'll be ready to take the attitude Jean Margaret Crowe described so eloquently in her article on mid-life divorce, "Beginning Again", published in the February, 1979 edition of Legion. She wrote:

> *I felt strongly that 30 years of marriage and the raising of three children is a triumph, not a disaster, even when it ends. We were not mourning a death. We were beginning a new way of living.*

If you can adopt her attitude, you could find yourself on the threshold of an exciting new adventure in living -- and still have a friend in your former spouse.

We won't pretend that starting again will be easy, involving for you as it will, serious and continuing responsibility for the care of children, the need to work, and so on. However, it can be made easier by adopting a positive outlook.

Good luck to you.

E. Phyllis Ellis
Director
Alberta Women's Bureau

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INTRODUCTION

For most people, ending a marriage is the most stressful event next to a death in the immediate family. We prepared this information sheet with the hope that it would make it easier for you to cope with some of the problems you may encounter in getting a separation, annulment, or divorce.

To introduce you to the concepts of legally ending a marriage, we outline the steps involved, the alternatives available to you, and the advantages and disadvantages of various courses of action.

After deciding on a course of action, probably the next thing is to decide whether you want to hire a lawyer, or do the work yourself.

Doing the work yourself is unquestionably less expensive than engaging legal counsel, and is becoming very popular. Books describing the process, and which contain sample forms, are available from bookstores or from your public library; some are listed in our bibliography. The forms are available from specialty retail stationery stores.

However, unless you are very confident of your ability to complete all the forms accurately, to handle court procedures, and to remain calm and objective during what could be a highly emotional and potentially lengthy proceeding, then perhaps you would be wiser to engage a lawyer. Doing so will certainly be easier on you. Moreover, if you choose a lawyer experienced in these matters, she may be able to apply that experience to your advantage.

The Law Society of Alberta offers a free lawyer referral service that will give you the names of lawyers in your community who deal with separation, divorce and annulment. (The address and telephone number are listed at the back of our paper).

Remember, even should you hire a lawyer with the specific object of securing a divorce, your lawyer is obliged to ask you about the possibilities of reconciliation, and cannot begin divorce proceedings until reconciliation has been considered.

A word about legal fees. While an approximate schedule of charges will be found in another section of this paper, you should remember that only your lawyer, after studying your case, can estimate what the fee will likely be. Don't shy away from the subject of fees. If your lawyer is not prepared to discuss fees before proceedings begin, consider

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getting another lawyer. If you cannot afford the full cost, contact the Legal Aid offices to see whether they can help you. (See the section called Address and Telephone Numbers).

Whether you decide to engage professional legal counsel or to handle the work yourself, we hope that the following discussion will help you understand both the concepts and the procedures involved.

SEPARATION

To begin with, it is not illegal to live apart, so no one can force you and your spouse to live together. A husband and wife are legally separated when they decide they no longer want to live together and begin living apart. (However, the phrase "legally separated" is usually reserved to describe the situation after both parties have signed a separation agreement, or have been granted a judicial separation. These two kinds of separation are described later).

Talking to a lawyer and a counsellor before separating may be a good idea. The lawyer should be able to help you with questions relating to the custody and maintenance of children, the effect of separation on joint bank accounts, credit cards, marital property, payment of bills, existing wills, and on other matters relating to your individual circumstances (such as the procedure to occupy a house held in your spouse's name) that a general information sheet like ours cannot cover in detail. The Family Court Conciliation Service provides counselling on referral from a lawyer. (See the section on Addresses and Telephone Numbers). The Conciliation Service will help both those people wanting to save their marriages, as well as those who have decided on separation and require help adjusting.

Matters relating to the custody and maintenance of children (referred to above), are among the most important and touching aspects of ending a marriage. Through its amicus curiae (friend of the court) programme, Alberta has over a decade of experience in providing impartial legal counsel on behalf of children caught up in divorce. The service is fully described in the Alberta Women's Bureau's free information sheet called A Child's Lawyer: Legal Counsel, Children and Divorce. The Alberta government's amicus curiae services are available through the Civil Law Division of the Department of the Attorney General. (The address and telephone number are given at the end of this paper).

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If you feel you may need a restraining order to exclude your spouse from the matrimonial home or from wherever you are living, you should seek the services of a lawyer. The presence of a restraining order is usually necessary before the police will become involved in keeping spouses apart. A restraining order will usually be granted only if there have been threats or incidents of physical abuse. The party requesting such an order must usually apply at the same time for a divorce or a judicial separation. A copy of the restraining order must be served on the spouse before it takes effect, unless a judge dispenses with this requirement when granting the order.

There are three ways of becoming separated: living apart with no contract or court order, judicial separation, and separation governed by a contract between the parties.

Living apart with no formal agreement or without a court order is also referred to in legal language as de facto separation. It is probably the most common type. In a de facto separation, one spouse simply leaves the matrimonial home. If the other spouse does not agree to the departure, the one who leaves may be in desertion. (Desertion occurs when one spouse leaves the other without good reason, or without the other spouse's consent). Because the conduct of parties is a factor the courts must consider when deciding how much maintenance (if any) should be ordered, desertion can affect the amount of support a spouse may receive or pay.

A judicial separation is a court order which states that the spouses no longer have to live together, but it does not leave them free to remarry. The advantages of a judicial separation are that neither party is in desertion, and that the court can make orders regarding maintenance, custody, and property. The wife acquires the legal capacity of a single woman, and, as a result, is then free to establish her own domicile or legal home, and can sue her husband as though he were a stranger.

However, there are some disadvantages to a judicial separation.

First, the party seeking a judicial separation must have grounds for it, almost as though a divorce were being sought. (Grounds for divorce are discussed in the section dealing with divorce). There are some important differences between grounds for divorce and grounds for judicial separation. The grounds for judicial separation will not be discussed in detail here but include adultery, cruelty, desertion, sodomy, and bestiality. These "offences" must be committed by the spouse who is not asking for the order of judicial separation. You cannot provide the grounds if you are asking for the judgement.

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A second disadvantage is that a judicial separation is at least as expensive as a divorce, but it does not leave the parties free to remarry as they could after a divorce.

Generally speaking, judicial separations are rare because there are so many disadvantages and so few advantages. A judicial separation is usually sought by people who have religious scruples about divorce.

A separation agreement is a contract, much like a commercial contract. When a husband and wife separate, they usually try to agree on reasonable terms and conditions governing such matters as money, property, maintenance, custody and access, insurance and medical care, furniture, vehicles, and so on. If you can agree, you should have a lawyer write a contract reflecting the agreement. That contract is enforceable in the courts except in the rare circumstances when one party was forced to sign it, or when it does not provide a fair amount of maintenance for the spouse or children.

As with any contract, there are a lot of complex questions of law surrounding separation agreements. Once you sign such a contract, any problems you may have with it should be referred to your lawyer.

The Alberta government recently passed The Matrimonial Property Act, to guide the courts in determining how marital property should be distributed if the spouses disagree on the distribution. One of its provisions allows a married couple to prepare a contract that, if it meets conditions specified in the act, will override the act's general intent. Consult a lawyer to advise you on how this provision can affect your separation agreement. (The Matrimonial Property Act will be described more fully in a later section).

In every case, it is a good idea to get independent legal advice before signing a separation agreement. Talk to your own lawyer to become aware of the effect the agreement will have on your rights.

The Advantages of a Separation Agreement

1) It releases spouses from the "duty" to cohabit (to live together).

2) Either a separation agreement or a court order is needed to claim periodic maintenance payments as income tax deductions.

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3) You won't have to go to court to argue property, maintenance, custody, etc., unless you disagree with the contract. In the case of divorce, the petitioner (the spouse asking for the divorce) must appear at the trial of the divorce action.

4) The separation agreement can cover many more matters and is more flexible than a court order could be.

5) The agreement is considered a very important document if a couple divorces. The judge at the divorce trial will usually (but not always) follow the terms of the agreement on maintenance, or will make it part of the order granting the divorce. When the agreement is made in part of the order granting the divorce it is referred to as the minutes of settlement.

The Disadvantages of a Separation Agreement

1) It can take a lot of time and money to enforce the agreement if the other spouse no longer wishes to abide by its terms.

2) The courts will not enforce some agreements at all. For instance, parents do not have the right to agree not to request support or not to pay support for their children. There are limitations on your ability to give up rights given to you by law.

3) An agreement does not end the marriage.

4) If you divorce, the judge does not have to follow the agreement on custody and maintenance of children, or the agreement on spousal maintenance.

5) It can be difficult to change the agreement.

6) Both parties must consent to the separation agreement. You cannot force your spouse to agree to it.

7) The wife may suffer if either of these two clauses is included:

   a) the dum casta clause, whereby the wife receives maintenance only if she does not have sexual intercourse with anyone else

   b) the dum sole clause, whereby payments are made only until she remarries or lives in a common-law relationship.

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What Can I Take When I Decide To Leave?

You own and can take all your personal clothing and goods, anything given to you, and anything paid for with money you earned yourself. If you take the children with you, you can take what you need for them, including dishes, beds, and clothing.

Separation and Maintenance

You can receive maintenance for yourself and the children by agreement on maintenance payments in the separation agreement.

In the absence of a separation agreement, the wife can ask the Family Court to issue a maintenance order based on its appraisal of the family's circumstances. (At the present time maintenance is not available to husbands). Even if the wife is in desertion, the Family Court can issue an order for maintenance of the children of the marriage. A Family Court maintenance order may be changed by applying to the Family Court and giving the reasons for the request. The reasons may include changed financial circumstances brought about, for example, as a result of remarriage or a job change.

The Family Court will also deal with situations involving a refusal to pay maintenance, and may be able to help enforce the payment of maintenance awarded by the Family Court of any other province. The Family Court also has the power (the jurisdiction) to enforce maintenance orders granted upon divorce in any province.

If you receive social assistance, the officials of the Department of Social Services and Community Health may require you to apply for a maintenance order when you and your spouse separate. The maintenance payments will be made to the Department to reimburse it for providing for you. The money you receive from the Department should not be affected by your spouse's payment or non-payment of maintenance as long as those payments are made to the Department and not directly to you. If the maintenance payments are larger than the social assistance allowance, it may be to your advantage to receive the payments directly rather than rely on social assistance because recipients of social assistance are very limited in the amount of money they are allowed to receive from other sources.

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Can I Change My Name After We're Separated?

A woman can use either name, -- her husband's or her maiden name, -- when she is separated, just as she can while she is married.

Ending the Marriage

So far we have discussed separation, which is usually the first step toward ending a marriage. The remainder of this paper discusses what is involved in ending a marriage through legal action.

Marriage can end in three ways: by death, by divorce, or by annulment. The first-named (death) does not require any analysis here; a discussion of the other two follows.

ANNULMENT

Annulment (a declaration that there never was a marriage) is not used as often as divorce to end a marriage because of the strict requirements involved. There will be grounds for annulment, if, at the time of the marriage:

1) one person was already married

2) one person was under the legal age for marriage

3) one person was insane

4) the couple are related closer than first cousins

5) one person was forced to marry under duress

6) one person was mistaken about the ceremony (that is, did not know it was a marriage), or about whom he or she was marrying

7) one person was impotent.

Anyone trying to annul a marriage will likely need the help of a lawyer, as annulment is a difficult process. The cost will probably be about the same as for a divorce.

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DIVORCE

What are the effects of divorce?

1) Each party is free to remarry.

2) Dower rights end. (These are the rights each spouse has to the matrimonial home and are discussed in a later section).

3) A divorced woman is free to establish her own domicile, or legal home. (A married woman's legal home is where her husband has his true, fixed, and permanent home, even while the spouses are separated, unless they are judicially separated).

The Basic Requirements

There are two requirements before you can consider getting a divorce in Alberta:

1) You must meet residency requirements.

2) You must have grounds for divorce.

Residency Requirements

First, your domicile (the place where you and your spouse have your permanent home) must be in Canada. Second, you and your spouse must have made your home in Alberta for at least one year, and must actually have lived here for at least ten months before you may begin divorce proceedings.

Grounds for Divorce

People cannot simply decide to divorce; they must have grounds for doing so. Moreover, the grounds cannot be used by the spouse who was guilty of the offence. For example, if John committed adultery, he cannot divorce his wife using his own adultery as the reason. His wife is the only one who can petition for a divorce on the basis of John's adultery.

Grounds for divorce are of two types: matrimonial offences (such as adultery or bigamy), and marriage breakdown (such as separation or long-term addiction to alcohol or drugs).

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Matrimonial Offences

1) Adultery

Adultery is voluntary sexual intercourse with someone of the opposite sex who is not your spouse. Involuntary intercourse, as in the case of rape, is not adultery.

Adultery can be proven by the "guilty" spouse admitting to it under oath in front of a judge OR by use of witnesses. In Alberta, the name of the person who had intercourse with the adulterer need not be given unless the judge asks.

2) Sodomy, Bestiality, and Rape

Sodomy is anal intercourse with a person. Bestiality is intercourse between a person and an animal. A man who forces sexual intercourse on a woman who is not his wife is guilty of rape.

3) Homosexuality

For homosexuality to be grounds for divorce, homosexual acts must be proven by clear evidence. One spouse cannot simply admit to homosexuality; he or she must admit to a particular act.

4) Bigamy

A married person who goes through another form of "marriage" (which is not a marriage at all) with a person not his spouse commits bigamy and can be divorced from his true spouse.

5) Physical or Mental Cruelty

The definition of "cruelty" is conduct which makes cohabitation intolerable. This means that your spouse's conduct was so bad you had to leave. Usually, but not always, cruelty is behavior that forces the injured spouse to seek medical help. Proving cruelty is likely to involve that spouse taking the witness stand and testifying under oath about the behavior and its effects.

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Marriage Breakdown

Grounds involving marriage breakdown differ from matrimonial offences in that they are considered symptoms of a marriage failing to work rather than as situations involving one spouse's guilt and the other's innocence. A number of grounds are discussed below.

1) Imprisonment

Grounds for divorce exist if the respondent spouse (the one from whom a divorce is sought) has been imprisoned for three or more years during the five years just before the petition is presented. Grounds for divorce also exist if the respondent spouse has been imprisoned for two or more years before the petition is presented and is serving a term that is for life or for ten or more years. The appeals against the conviction must be completed before imprisonment can be grounds for divorce.

2) Addiction to Alcohol or Drugs

The respondent must have been grossly addicted to alcohol or a narcotic as defined in The Narcotic Control Act for three or more years just before the petition is presented. There must be no reasonable expectation of the respondent's rehabilitation within a reasonably foreseeable period. Because of this, it is almost impossible to get a divorce on these grounds.

3) Missing Spouse

A petitioner (the one seeking the divorce) has grounds for divorce when he or she has no knowledge of information as to the whereabouts of the respondent for the three years preceding the petition, and has unsuccessfully tried to find the spouse.

4) Non-Consummation of Marriage

Consummation of a marriage is the first act of sexual intercourse after marriage. If the marriage has not been consummated after one year, and if one spouse has been unable by reason of illness or disability to consummate the marriage, or has refused to consummate it, then the other spouse has grounds for divorce.

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5) Living Separate and Apart

If a husband and wife have been living separate and apart for three years, either one of them can divorce the other provided one didn't desert the other.

Couples use lengthy separation as grounds for divorce when there are no other grounds, or when the other grounds are very difficult to prove. An obvious disadvantage is that it will be three years before either spouse is free to remarry.

A husband and wife may live separate and apart even if they cannot afford to live in separate homes. The prime requirement is being able to prove that they intended to end the marriage. There are cases where proving that intention involved the couple using separate bedrooms, having no sexual intercourse, little or no communication, eating their meals separately, having separate social activities, as well as not performing household tasks for each other.

However, if one spouse deserted the other, the one who deserted must wait five years for a divorce based on lengthy separation. As mentioned earlier, desertion occurs when one spouse leaves the other without good reason, or without the other's consent.

(There is a circumstance, called "constructive desertion", in which one spouse forces the other to leave home. For instance, if a husband beats his wife and she leaves home, he is said to be in constructive desertion for causing her to leave).

The First Steps: Securing the Necessary Documents

Once you determine that you meet the residency requirements and have grounds for divorce, you are in a position to begin divorce proceedings.

Securing the following documents at the outset will save you a lot of time and trouble, whether you engage legal counsel or not.

1) a copy of your marriage certificate

2) birthdates of yourself, your spouse, and any children of the marriage. (Remember that children of the marriage may include the children of one spouse only).

3) details regarding your residence for the last year

4) your spouse's address (The services of a detective, who can be engaged through your lawyer, may be required to locate a missing spouse).

5) a picture of your spouse

6) a copy of the separation agreement, if there is one

7) details of any court proceedings concerning separation, maintenance, custody or access (such as the dates, the courts in which they were held, the orders made, and the judges involved)

8) details concerning the grounds you think you might have for divorce (For example, if you are alleging physical or mental cruelty, try to provide the names of the doctors who treated you, or the names of witnesses who will go to court).

9) Prepare a statement outlining the present financial status of you and your spouse.

Beginning Divorce Proceedings

1) If you meet residency requirements and if you have grounds for divorce, you or your lawyer may petition the Supreme Court of Alberta for a divorce. The petition sets out the names of the parties, when and where they were married, and the reason they want the divorce. The reason must be one of the grounds for divorce cited in The Divorce Act. The person asking for the divorce is called the "petitioner", and the other spouse is called the "respondent".

2) The petition is filed (handed in to the clerk), and a court date is set. A copy is sent to your spouse, and may result in an Answer contesting the divorce.

3) Your spouse may appear in court, but does not have to.

Interim Alimony

Once the divorce petition has been filed, but before the hearing takes place, either spouse may apply to the court for a support allowance (called alimony) to be paid by the other spouse until the divorce hearing takes place. The judge will grant alimony if the applicant spouse can prove need for it, and if the other spouse can afford to pay it.

What Happens Next?

1) Your spouse may decide not to contest the divorce. This is the easiest type of divorce, as only the petitioner (the one asking for the divorce) must attend at court when application is made for the decree nisi. The petitioner will likely be one of many people attending for the same reason (in Edmonton there are about 60 uncontested divorces heard every Monday afternoon). The petitioner in each case must take the witness stand and give evidence under oath about the marriage and the grounds, and answer any questions the judge may have.

2) If the divorce is contested, there will be an examination for discovery. This is an official meeting, attended by the husband and wife, their lawyers, and a court reporter. At this meeting, the parties are under oath; they must answer truthfully any questions relevant to the disagreement. The questions and answers are written down by the court reporter and can be used in court.

3) Your spouse may "counter-petition" for divorce if she or he also has grounds for divorce. The petition and the counter-petition will be heard at the same time in court.

What Happens in Court?

1) The divorce trial itself will take place in the Supreme Court of Alberta, and anyone may attend.

2) You will be asked questions under oath, and must answer them truthfully. If it is a contested divorce, your spouse and other people will probably also give evidence.

3) If the judge decides that the requirements for a divorce have been met, he or she will grant a decree nisi. This is an interim step only, and you are not yet free to remarry. A copy of the decree must be sent to the respondent spouse (the one not seeking a divorce).

4) After three months, either party may apply for a decree absolute unless one of them tries to stop the divorce by launching an appeal. The decree absolute will not be granted if the husband and wife are again living together. In special circumstances the decree absolute can be made sooner then three months.

5) The divorce is final once the decree absolute is granted, and each party is then free to remarry.

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Dower Rights

Probably the most important result of divorce is to leave you free to remarry.

Another effect is to put an end to a couple's dower rights, the rights both spouses have to the matrimonial home when it is held in one spouse's name only. Dower rights relate only to the matrimonial home, and exist only while the husband and wife are married or separated.

Dower rights involve three provisions.

1) While dower rights exist, the spouse who owns the matrimonial home cannot sell it unless the other spouse consents and signs the required documents.

2) If the owner spouse dies first, the surviving spouse may live in the home for the rest of his or her life.

3) If the owner spouse disposes of the matrimonial home without the other's consent, the non-owner spouse has the potential right to one-half the value of the home.

Dower rights end with divorce; they are seldom affected by separation.

Children and Divorce

Divorces involving children usually include a court order determining custody, access, and maintenance of the children of the marriage. (In some circumstances, children of the marriage may include someone who is the child of only one of the spouses in a divorce). To qualify for maintenance, children must be under 16 years of age, or, by reason of illness, other disability or other cause, be unable to support themselves if they are over 16 but under 21.

See the section on page 26 dealing with the amicus curiae programme.

Divorce and Maintenance

When the divorce decree is granted, the judge may order either spouse to make payments to the other spouse, or to the children of the marriage, or to the other spouse and to the children of the marriage. Each party may ask the judge for maintenance either in person or through legal counsel.

The court will consider the conduct of both parties when awarding maintenance, and may decide not to award it if the requesting spouse did something unacceptable, such as, deserting the other spouse. The awarding of maintenance is a matter of judicial discretion.

Maintenance will be paid either periodically (for instance, monthly) or as a lump sum. Periodic payments are tax deductible if made as the result of a court order or separation agreement. Lump sum settlements are not tax deductible. The recipient spouse must treat periodic maintenance payments as taxable income.

It might be difficult to obtain maintenance after the divorce decree is issued if there was no provision for maintenance. Therefore, as you could someday require financial assistance from your former spouse, it may be to your advantage to have the divorce decree include provision for a token maintenance, say, of one dollar a year, which you can later apply to be increased. We make this recommendation because it is easier to increase maintenance than it is to get a maintenance award when the divorce decree did not provide for any at all.

What If We Decide to Try Again?

There is no problem with trying to live together again before the decree absolute is granted, except that if you want to establish three or five years of separation as the basis for divorce, you must not live together longer than 90 days (about three months), while attempting a reconciliation. However, if you want to stay together permanently, there is no problem at all in doing so.

Barriers to Divorce

Not all petitions for divorce are granted. Some of the most common reasons are discussed below.

1) Grounds Not Proved

   If the grounds have not been proved to the judge's satisfaction, the judge must refuse the divorce even when it is uncontested. Proving grounds for divorce means presenting evidence of those grounds, often with the aid of witnesses. For instance, proving adultery might involve witnesses testifying that they saw your spouse living with another person. Because some grounds are very difficult to prove, many people decide to get a divorce based on three or five years of separation.

2) Forgiveness of the Matrimonial Offence

Even if the grounds are proved, a judge may refuse to grant the divorce if the grounds involve matrimonial offences that the petitioner has forgiven. The technical name for this forgiveness is condonation. Resuming sexual relations is often interpreted by the court as a sign of condonation.

The Divorce Act allows couples to attempt reconciliation by living together for a three-month period without calling it condonation. This means that if the couple separate before or at the end of three months of attempted reconciliation, the petitioner has not lost his or her grounds for divorce. This provision was put into The Divorce Act to encourage couples to attempt reconciliation.

However, a judge is free to look at the public interest when deciding whether or not to grant a divorce, regardless of whether condonation has taken place. Although the guidelines may not always be clear, the judge is sometimes called upon to decide whether it is in the public good to insist that the couple be divorced.

As we said above, condonation is forgiveness of a matrimonial offence. It therefore does not apply when the grounds for divorce are marriage breakdown, such as three or five years of separation, imprisonment, or addiction.

Finally, forgiveness is not considered a barrier to divorce unless the petitioner knew all the circumstances and facts when forgiving the offence.

3) Connivance

Connivance means that the petitioner has willingly consented to and encouraged the respondent's behavior, and that both of them have put forward that behavior as grounds for divorce.

Connivance and condonation are discretionary bars to divorce, meaning that the judge may refuse to grant the divorce, but has the power to grant it if the public interest would be served in doing so.

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4) Collusion (Deceiving the Court)

When a husband or wife petitioning for divorce decide to make up evidence or to withold relevant facts, they are guilty of collusion. Because collusion is an absolute bar to divorce, the judge must refuse to grant the divorce even if he thinks it would be in the public interest to grant it.

5) Expectation of Reconciliation

When the grounds involve marriage breakdown, the judge may refuse to grant the divorce if there is a reasonable expectation that cohabitation will occur or be resumed within a reasonably foreseeable period. The rule is vague, and allows the judge considerable latitude.

6) Maintenance Arrangements for the Children Would be Prejudiced

A divorce may be refused if it would be difficult to make reasonable arrangements for the maintenance of children. In deciding such cases the court considers a number of factors, including the parents' income, the ages of the children, the family's health, and its general circumstances.

7) Divorce Would be Unduly Harsh or Unjust to Either Spouse

The courts look at all the circumstances to decide if the divorce would be unduly harsh or unjust to either spouse. For instance, if the only source of income was from a relative who would oppose the divorce, it might be refused as being unduly harsh or unjust.

The Cost of Divorce

The following is only a rough guide to the cost of getting a divorce, and is expressed in 1979 figures.

To begin with, if you decide to engage legal counsel but to act for yourself, the cost will be about $60.00. As we mentioned in the introduction, there are books that describe how to get a divorce, and stores that sell the necessary forms.

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If you engage legal counsel, the cost will depend on the complexity of the case. If the divorce is uncontested (that is, if each party agrees on everything), the cost will be around $500 to $700. However, if the divorce is contested, (for example, the spouses disagree on the grounds for divorce), the cost will vary with individual circumstances but will be much more expensive than an uncontested divorce.

Remember, this guide is only approximate. Only your lawyer can give you an accurate estimate of the costs you will likely incur.

How Long Does a Divorce Take?

An uncontested divorce will take from four to eight months. It is not unusual for a contested divorce to take two years. A divorce based entirely on separation will take over three years from the date of separation. One based on desertion will take over five years from the date of separation.

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BIBLIOGRAPHY

Our information sheet is only a guide to the subject of ending a marriage in Alberta. It deals only with the legal aspects of the matter, and does not examine its emotional and psychological elements. The following bibliography was compiled to assist the interested reader to look more deeply into all aspects of ending a marriage. Your public library or bookstore can help you secure these and similar works. Price and place of publication are included when known.

Legislation

Perhaps the best place to begin reading about ending a marriage is the legislation that governs it throughout Canada. Ask your librarian or bookseller for a copy of The Divorce Act, and its amendments and regulations (Revised Statutes of Canada, chapter D-8). Other important legislation to read is The Matrimonial Property Act and the statutes cited in the appendix to this paper that discusses the implications of that act. Those statutes are available from libraries, or may be purchased directly from:

Publications Branch
Public Affairs Bureau
620 - 7th Avenue S.W.
Calgary, Alberta
T2P 0Y8

Telephone: 261-6251

Publications Branch
Public Affairs Bureau
11510 Kingsway Avenue
Edmonton, Alberta
T5G 2Y5

Telephone: 427-4952

Books: Divorce in General

About Your Divorce: 82 Questions and Answers With Budget and Asset Worksheets. Lawyers and Judges, 1974, paperback.

Alberta Divorce Guide (How to Obtain Your Own Divorce), by Richard Garrison. Toronto, International Self-Counsel Press, 1973, $6.95, paperback.

Before Divorce, by John M. Vayhinger. Fortress, 1972, $1.75, paperback.

Between Marriage and Divorce, by Susan Braudy. New American Library, 1976, $1.75, paperback.

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Divorce: The New Freedom, by Esther D. Fisher. New York, Harper-Row, 1974, $7.95.

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Everything You Should Know About Law and Marriage, by F.A.R. Chapman. Toronto, Modern Canadian Library, 1974.

Going Through Divorce: Facing the Problems of Adjustment, by Howard M. Vollmer. Pacific Books, 1975, $6.95.

Guide to Marriage, Divorce and Family Law in Canada, by Norman Lipson. Toronto, Coles, 1976.

How to Divorce Your Wife: The Man's Side of Divorce, by Forden Athearn. New York, Doubleday, 1976, $6.95.

The Hurt and Healing of Divorce, by Darlene Petri. Cook, 1976, $1.95, paperback.

The Law of Divorce in Canada, by Irving D. Temins. Toronto, Primrose, 1969.

Life After Marriage: Divorce as a New Beginning, by Mary A. Singleton. Dell, 1977, $2.25, paperback.

Living and Loving After Divorce, by Victoria Pellegrino and Cathy Napolitane. Rawson, 1977, $9.95.

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Made in Heaven ... Settled in Court, by Marvin Mitchelson. Los Angeles, J.P. Tarcher, 1976, $7.95.

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Marriage and Family Law in Alberta, by Jean McBean. International Self-Counsel Press, 1975, $3.95, paperback.

Marital Separation: Managing After a Marriage Ends, by Robert S. Weiss. Basic, 1977, $4.95, paperback.

The Old Love and the New: Divorce and Readjustment, by Willard Waller. Carbondale, Southern Illinois University Press, 1967, $7.95.

The Self-Help Guide to Divorce, Children, and Welfare, by Penelope Jahn. Toronto, Anansi, 1976, $3.95, paperback.

Turn on the Lights, Somebody, It's Divorced in Here!, by Dixie Price. Exposition, 1975, $4.00.

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What Every Formerly Married Woman Should Know, by Louise M. Athearn. New American Library, 1974, $1.50, paperback.

What Every Man Should Know About Divorce, by Robert Cassidy. New Republic, 1977, $8.95.

When Marriage Ends, by Russell J. Becker. Fortress, 1971 (?), $1.75, paperback.

Books: Divorce and Children

A Look At Divorce, by Margaret S. Pursell. Lorner Publications, 1976, $4.95.

The Boys' and Girls' Book About Divorce, by Richard Gardner. Aronson, 1971, $10.

A Child's Lawyer: Legal Counsel, Children and Divorce, by the Alberta Women's Bureau. Edmonton, 1977, free.

Custody and Access, by the Alberta Women's Bureau. Edmonton, 1977, free.

Explaining Divorce to Children, by Earl A. Grollman, ed. Boston, Beacon Press, 1972, $4.95, paperback.

How Does it Feel When Your Parents Get Divorced?, by Terry Berger. Messner, 1977, $6.64.

How to Get it Together When Your Parents Are Coming Apart, by Arlene Richards and Irene Willis. Bantam, 1977, $1.75, paperback.

I Have Two Daddies, by Lillian Stover. Grossmont Press, 1977, $2.95, paperback.

Parents Without Partners: A Guide for Divorced, Widowed, or Separated Parents, by Jim Egleson, and Janet Frank Egleson. New York, Dutton, 1961.

Talking About Divorce: A Dialogue Between Parent and Child, by Earl A. Grollman, Boston, Beacon Press, $2.95, paperback.

The Parents' Book About Divorce, by Richard Gardner. New York, Doubleday, 1977, $9.95.

Two Homes to Live In, by Barbara S. Hazen. Human Science Press, 1977, $6.95.

When Parents Divorce: A New Approach to New Relationships, by Bernard Steinzor. New York, Pantheon, 1969, $7.95.

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Addresses and Telephone Numbers

The following addresses and telephone numbers may be helpful if you are considering ending a marriage.

The Law Society of Alberta offers a free lawyer referral service. To get the name of a lawyer in your community who deals with whatever legal problem you are facing, contact:

Lawyer Referral Service
611 - 4 Street, S.W.
Calgary, Alberta
T2P 1T5

Telephone: 1-800-332-1110 (toll free)

Legal Advice

If you don't qualify for legal aid (see below) but need a lawyer's advice or assistance, contact:

Calgary Legal Guidance
No. 106
223 - 12 Avenue, S.W.
Calgary, Alberta

Telephone: 265-5545

Student Legal Services
Room 108, Law Centre
University of Alberta
Edmonton, Alberta
T6G 2H5

Telephone: 432-2226

Student Legal Assistance (Calgary)
Room 595 Bio-Science Building
University of Calgary
Calgary, Alberta
T2N 1N4

Telephone: 284-6637

Legal Aid Society of Alberta

Main Floor, Rocky Mountain Plaza
100, 615 MacLeod Trail, S.W.
Calgary, Alberta
T2G 4T8

Telephone: 261-2260

401 Melton Building
10310 Jasper Avenue
Edmonton, Alberta
T5J 2N4

Telephone: 427-7575

Family Court

Family and Juvenile Courts
Room 101, J.J. Bowlen Bldg.
620 - 7th Avenue S.W.
Calgary, Alberta
T2P 0Y8

Telephone: 261-3470

Family and Juvenile Courts
Suite 500, Century Place
9803 - 102 A Avenue
Edmonton, Alberta
T5J 3A6

Telephone: 427-2743

You may telephone the Family Court (or any other Alberta government agency) toll-free by dialling the R.I.T.E. (Regional Information Telephone Enquiry) number listed in your local telephone directory under the heading "Government of Alberta".

Amicus Curiae

Alberta's amicus curiae (or, "friend of the court") programme attempts to provide impartial legal counsel in an effort to serve the best interests of children caught up in divorce.

Persons interested in engaging the services of the Alberta government's amicus curiae may contact:

Civil Law Division
Attorney General
Mezanine Floor, J.J. Bowlen Bldg.
620 - 7th Avenue S.W.
Calgary, Alberta
T2P 0Y8

Telephone: 261-3360

Civil Law Division
Attorney General
Madison Building
9919 - 105th Street
Edmonton, Alberta
T5K 2E8

Telephone: 427-5114

If you are experiencing emotional problems or think you and/or your spouse could benefit from counselling, contact your nearest Preventive Social Services or Alberta Social Services and Community Health office and someone there can provide you with referral assistance.

You may also wish to contact your minister, priest, rabbi or pastor for advice in this regard.

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Appendix

THE MATRIMONIAL PROPERTY ACT

The following material is extracted from the Alberta Women's Bureau publication Laws for Albertans. It is included here because the provisions of The Matrimonial Property Act will have an effect on everyone who is ending a marriage in Alberta. Our outline of the act's major provisions is not intended to replace either a thorough study of the act itself, or professional legal counsel. It is provided as a general introduction to a new dimension of Alberta's family law legislation.

The Matrimonial Property Act took effect January 1, 1979.

General Purpose

The Matrimonial Property Act deals with the distribution of property between spouses on marriage breakdown when the spouses disagree on the distribution of that property.

Under previous legislation, each spouse was entitled to a share of only that property to which he or she had made a financial contribution. All other contributions, such as labourer or homemaker, were disregarded. The Matrimonial Property Act eliminates that unfairness. With certain precisely defined exceptions, the act's general intention is to assure that each spouse receives half the property acquired during the marriage unless the court considers it unfair to do so.

Fligibility

Spouses meeting the following conditions are eligible to apply for a matrimonial property order.

1) The spouses must be residents of Alberta as defined in the act.

2) They must disagree on the distribution of their property.

3) The marriage must have ended through:

   a) divorce

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b) a declaration of nullity of marriage

c) judicial separation

d) separation for at least one year, or for less than a year if, in the court's opinion, there is no possibility of reconciliation, or if one spouse is trying to defeat the intention of the act by transferring property to a third party, by giving it away, or by dissipating it.

In general, an application for a matrimonial property order must be made within two years of the marriage's breakdown, or within one year if one spouse tries to transfer property as described above.

It is not necessary for both spouses to be living before an application may be made for a matrimonial property order. A surviving spouse may make or continue an application for a matrimonial property order after the death of the other spouse if:

a) the surviving spouse could have applied for the order before the other spouse's death

b) no more than six months have passed after the date of issue of a grant of probate or administration of the estate of the deceased spouse.

Once proceedings have begun under the act, the deceased spouse's estate may not be distributed without the living spouse's consent or a court order.

Of course, there is no need for the spouses to use The Matrimonial Property Act if they agree on the distribution of their property.

Finally, the act applies only to people who are, or have been, married to each other. It does not apply to people living in a common-law relationship.

Procedure

A spouse makes an application for a matrimonial property order to the Supreme Court of Alberta or the District Court of Alberta through a statement of claim that discloses particulars of all property owned, whether in Alberta or not.

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Summary of Terms

In general, the act's intention is to divide the marital property evenly between the two spouses when their marriage ends and they disagree on the division.

To achieve that goal, the act gives the court full power to transfer money and property between spouses, and to order the sale of property for distribution between the spouses. It also empowers the court to prohibit the transfer or giving away of property if it is done to get around the provisions of the act. Furthermore, the act provides that, once proceedings have begun, no one may dispose of any household goods or remove them from the matrimonial home without the consent of the court or of both spouses, except in an emergency.

Those are the general terms. More specifically, The Matrimonial Property Act instructs the court to consider the following 13 features in determining the division of property.

1) Contribution made by each spouse to the marriage and to the welfare of the family, including work as a homemaker, parent, farm labourer, etc.

2) Contribution made by a spouse to any business, farm or enterprise owned by one or both of them. This could be a financial contribution or otherwise, made directly or indirectly to acquiring, improving or managing it.

3) Contribution made by either spouse to the acquisition, conservation or improvement of their property.

4) Financial resources of each spouse at the time of marriage and at the time of the hearing before the judge. This could include income, earning capacity, liabilities, obligations, property or other resources.

5) Length of the marriage.

6) Whether the property was acquired while the two were living separately.

7) Any oral or written agreement made between the spouses.

8) Whether a spouse gave or transferred property to a third person.

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9) Whether the property had already been transferred between spouses by gift, by agreement or by another matrimonial property order.

10) Terms of any previous court order.

11) Any tax liability by one spouse which might result from transfer or sale of property.

12) Whether one spouse has dissipated property to the other's disadvantage (given or sold so the other won't benefit).

13) Any other relevant circumstance.

Matrimonial Home Possession

In addition to providing for the distribution of property between spouses, the act gives the court the power to decide which spouse shall be given use of the household goods, as well as possession of the matrimonial home and its surrounding property, and for how long. The court can also evict a spouse from the matrimonial home, and restrain a spouse from entering it or loitering around it.

In making an award relating to the household goods and possession of the matrimonial home, the act instructs the court to consider these factors:

a) the availability of other accommodation within the means of both spouses

b) the needs of any children residing in the matrimonial home

c) each spouse's financial position

d) any previous court order relating to property or maintenance of one or both spouses.

Exceptions

There are two exceptions to the act's general intent.

1) Property acquired by a spouse before marriage, either as a gift from a third party, through inheritance, or through an insurance or court settlement made in favour of one spouse, is not subject to the provisions of the act, although its increase in value is.

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2) The act's provisions relating to matrimonial property do not apply if the spouses entered into a written contract with each other dealing with the status, ownership, and division of property, including future property, owned by either or both of them. The act defines the conditions the contract must meet before it becomes enforceable.

Effect on Other Legislation

The Matrimonial Property Act specifies its relationship to a number of other acts, including the following.

Provisions relating to disposition of the matrimonial home are in addition to a spouse's rights under The Dower Act.

An application made by a surviving spouse under The Family Relief Act may be joined with an application for a matrimonial property order.

Maintenance payments remain bound by the provisions of The Divorce Act and The Domestic Relations Act. It is likely that the amount of a maintenance award will affect, or will be affected by, any property award made under The Matrimonial Property Act.

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Definitions

Alimony - a support allowance given to one spouse by another while they are separated but still married (A spouse can apply for alimony through a court order).

Annul - to declare invalid, as in a marriage

Children of a marriage - the term may, in some circumstances, include someone who is the child of only one spouse in a marriage

Collusion - an agreement or conspiracy to which a petitioner is either directly or indirectly a party for the purpose of subverting the administration of justice

Condonation - forgiveness, as of a matrimonial offense

Connivance - consenting to, and encouraging a spouse's behavior to bring about a divorce

Court - see Family Court; Supreme Court of Alberta

Decree Absolute - a court order that finalizes the divorce; it follows a decree nisi, and is usually granted three months after the decree nisi

Decree Nisi - a court order constituting an interim stage in the process of getting a divorce

Desertion - one spouse leaving the other for no good reason, or without that spouse's consent

Divorce - dissolution of marriage

Dower rights - rights involving each spouse's share in the matrimonial home

Dum casta clause - a clause authorizing maintenance payments to a spouse only so long as the recipient spouse does not have sexual intercourse with someone other than the payor spouse

Dum sole clause - a clause authorizing maintenance payments to cease when the recipient spouse remarries, or enters into a common-law relationship

Examination for discovery - an official meeting of parties involved in a divorce, which is held after the respondent spouse contests a divorce

Family Court - a division of the Provincial Court of Alberta that handles problems of non-support, family assaults and threats, certain Liquor Control Act matters, enforcement of maintenance orders, custody and access (except where there is a divorce), charges against adults under The School Act, charges against adults under The Child Welfare Act (involving, for instance, neglect of children), and committal of a family member under The Mental Health Act. The Family Court offers a conciliation service to help people who are recently separated, or who are contemplating separation

Maintenance - payments made by one spouse to support a former spouse and/or the children of a marriage

Petitioner - the spouse seeking a divorce

Respondent - the spouse from whom a divorce is sought

Supreme Court - the Supreme Court of Alberta handles divorce, annulment, judicial separation, and the division of property. The intermediate court, the District Court, handles some of the same matters